



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2012-0263; FRL-9950-35-Region 6]

Approval and Promulgation of Implementation Plans; Oklahoma; Disapproval of Prevention of Significant Deterioration for Particulate Matter Less than 2.5 Micrometers – Significant Impact Levels and Significant Monitoring Concentration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to disapprove severable portions of the February 6, 2012, Oklahoma State Implementation Plan (SIP) submittal that establish certain *de minimis* thresholds for particulate matter less than 2.5 micrometers in diameter (PM_{2.5}) in the Prevention of Significant Deterioration (PSD) permitting requirements. Specifically, we are proposing to disapprove provisions that adopt and implement the PM_{2.5} significant impact levels (SILs) and significant monitoring concentration (SMC); both of which were vacated by a federal court and subsequently removed from federal PSD regulations. We are proposing to disapprove the submitted provisions as inconsistent with federal laws and regulations for the permitting of PM_{2.5}. The EPA is proposing this disapproval under section 110 and part C of the Clean Air Act (CAA).

DATES: Written comments must be received on or before [Insert date 30 days AFTER date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2012-0263, at <http://www.regulations.gov> or via email to wiley.adina@epa.gov. Follow the online instructions

for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Ms. Adina Wiley, (214) 665-2115, wiley.adina@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<http://www2.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at the EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Adina Wiley, (214) 665-2115, wiley.adina@epa.gov. To inspect the hard copy materials, please schedule an appointment with Ms. Adina Wiley or Mr. Bill Deese at 214-665-7253.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

I. Background

A. CAA and SIPs

Section 110 of the CAA requires states to develop and submit to the EPA a SIP to ensure that state air quality meets National Ambient Air Quality Standards (NAAQS). These ambient standards currently address six criteria pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide. Each federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin through air pollution regulations and control strategies. The EPA approved SIP regulations and control strategies are federally enforceable.

B. Prior Federal Action

Under Section 165(a) of the CAA, a major source may not commence construction unless the source has been issued a permit and has satisfied certain requirements. Among those requirements, the permit applicant must demonstrate that emissions from construction or operation of the facility will not cause, or contribute to, air pollution in excess of any increment, NAAQS, or any other applicable emission standard or standard of performance. This statutory requirement has been incorporated into federal regulations at 40 CFR 51.166(k)(1). Moreover, to support this analysis, PSD permit applications must contain air quality monitoring data representing air quality in the area affected by the proposed source for the 1-year period preceding receipt of the application. This statutory requirement has been incorporated into federal regulations at 40 CFR 51.166(m)(ii)-(iv).

In 2010, the EPA promulgated regulations for SIPs concerning PSD permitting for PM_{2.5} which included two voluntary screening tools: SILs and SMCs. 75 FR 64864 (Oct. 20, 2010). The SILs are screening tools that states with PSD SIPs apply in the issuance of a PSD permit to demonstrate that the proposed source's allowable emissions will not cause or contribute to a

violation of the NAAQS or increment. The SMC has been used to exempt sources from the requirement in the CAA to collect preconstruction monitoring data for up to 1 year before submitting a permit application in order to help determine existing ambient air quality. 78 FR 73699 (Dec. 9, 2013).

Sierra Club filed a petition for review of the PSD regulations containing the PM_{2.5} SILs and SMC with the United States Court of Appeals for the District of Columbia Circuit (the Court). On January 22, 2013, the Court issued an opinion granting a request from the EPA to vacate and remand to the EPA portions of the October 20, 2010, PSD regulations establishing the PM_{2.5} SIL and further vacating the portions of the PSD regulations establishing a PM_{2.5} SMC. *See, Sierra Club v. EPA*, 706 F.3d 428 (D.C. Cir. 2013).

In response to the Court's decision, the EPA amended its regulations to remove the affected PM_{2.5} SIL regulations from the federal regulations and to replace the existing PM_{2.5} SMC value with a "zero" threshold. 78 FR 73698 (Dec. 9, 2013). In that rulemaking, the EPA removed the regulatory text related to the affected PM_{2.5} SILs at sections 51.166(k)(2) and 52.21(k)(2). Although the Court vacated the PM_{2.5} SMC provisions in 40 CFR 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c), the EPA did not remove the affected regulatory text, but instead revised the concentration for the PM_{2.5} SMC listed in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) to zero micrograms per cubic meter (0 µg/m³). Because 40 CFR 51.166(i)(5)(iii) and 40 CFR 52.21(i)(5)(iii) establish an exemption from air monitoring requirements for any pollutant "not listed in paragraph (i)(5)(i)," the EPA explained that it would not be appropriate to remove the reference to PM_{2.5} in paragraph (i)(5)(i). Were the EPA to completely remove PM_{2.5} from the list of pollutants in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) of the PSD regulations, PM_{2.5} would no longer be a listed pollutant and the paragraph (iii) provision could be interpreted as

giving reviewing authorities the discretion to exempt permit applicants from the requirement to conduct monitoring for PM_{2.5}, in contravention of the Court's decision and the CAA. Instead, the EPA revised the concentration listed in sections 51.166(i)(5)(i)(c) and 52.21(i)(5)(i)(c) to "0" micrograms per cubic meter (µg/m³). This means that there is no air quality impact level below which a reviewing authority has the discretion to exempt a source from the PM_{2.5} monitoring requirements at 40 CFR 52.21(m).

C. Oklahoma's Submittal

On February 6, 2012, Oklahoma submitted revisions to its PSD SIP at OAC 252:100-8-33(c)(1)(C) that adopted provisions substantively identical to the EPA PSD SIP's requirement for PM_{2.5} PSD SMC. 40 CFR 51.166(i)(5)(i). The February 6, 2012, submittal also included revisions to OAC 252:100-8-35(a)(2) that adopted provisions substantively identical to the EPA PSD SIP's requirements for PM_{2.5} PSD SILs. 40 CFR 51.166(k)(2). The February 6, 2012, submittal included other revisions to the Oklahoma SIP that are severable from the voluntary PSD exemptions. Our Technical Support Document (TSD), available in the rulemaking docket, identifies the separate EPA actions addressing the remainder of the February 6, 2012 submittal.

II. The EPA's Evaluation

Our analysis, available in our TSD, finds that the State of Oklahoma adopted and submitted on February 6, 2012, revisions to the Oklahoma SIP that were substantively consistent with the voluntary exemptions from PSD monitoring at 40 CFR 51.166(i)(5)(i) and the requirements for a source impact analysis at 40 CFR 51.166(k)(2) promulgated on October 20, 2010. Subsequent to the submittal of these provisions, the Court vacated and remanded these provisions to the EPA. On December 9, 2013, we promulgated revisions to the PSD SIP rules that removed the vacated PM_{2.5} SILs provision and replaced the existing PM_{2.5} SMC value with a

“zero” threshold level at 40 CFR 51.166. Because the PM_{2.5} SILs and SMC are no longer valid exemptions from the requirements of a PSD SIP, we propose to disapprove these revisions submitted to be included in the Oklahoma PSD SIP as they are inconsistent with the federal statutory and regulatory permitting requirements for PM_{2.5}.

Disapproval of the submitted PM_{2.5} SILs at OAC 252:100-8-35(a)(2) ensures that the provisions at OAC 252:100-8-35(a)(1)¹ in the existing SIP continue to apply to PM_{2.5}. Namely, that the owner or operator of the proposed source or modification shall demonstrate that, as of the source's start-up date, allowable emissions increases from that source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions) would not cause or contribute to any increase in ambient concentrations that would exceed any NAAQS in any air quality control region; or the remaining available PSD increment for the specified air contaminants in any area, as determined by the Director of the Oklahoma Department of Environmental Quality.

Disapproval of the submitted PM_{2.5} SMC at OAC 252:100-8-33(c)(1) means that PM_{2.5} will not be a listed pollutant in the state's requirement for ambient monitoring data, and would appear to allow PSD permit applicants to avoid submitting PM_{2.5} monitoring data as part of their permit application. To address this concern, the Oklahoma Department of Environmental Quality submitted a letter on February 25, 2016, that demonstrated the State retains authority to require pre- and post-construction PSD monitoring for PM_{2.5} under the Oklahoma PSD SIP in the event that the EPA disapproves OAC 252:100-8-33(c)(1). Specifically, the SIP, under OAC 252:100-8-

¹ The EPA proposed approval of OAC 252:100-8-35(a)(1) on June 30, 2016, as consistent with federal PSD requirements. *See* 81 FR 42587.

35.1(b)(3)², grants the ODEQ Director the authority to request information regarding the air quality impact of the source or modification. The ODEQ interprets this SIP provision to grant the Director the authority to request monitoring data for PM_{2.5} as required under 40 CFR 51.166(m). Further, as noted in our December 9, 2013, final rule, any State regulations or approved SIP provisions adopting the PM_{2.5} SIL and SMC are unlawful and may not be applied even prior to their removal from the applicable State regulations or SIP. *See* 78 FR 73698, 73700. Because reliance on the PM_{2.5} SIL and SMC has been deemed unlawful, and because the State has provided a letter demonstrating underlying authority in the Oklahoma SIP at OAC 252:100-8-35.1(b)(3) to require pre- and post-construction monitoring for PM_{2.5}, we have determined it is appropriate to disapprove the submitted PM_{2.5} SMC provisions at OAC 252:100-8-33(c)(1).

The EPA has an obligation under section 110 of the CAA to act on submitted SIP revisions unless these revisions are withdrawn by the State. Therefore, the EPA has a duty to act on the submitted Oklahoma provisions pertaining to the PM_{2.5} SILs and SMC, because these provisions were submitted for EPA's review on February 6, 2012, and the state has not withdrawn the portion of the SIP submission containing these provisions. Our proposed action today will disapprove this portion of the February 6, 2012 SIP submission because these provisions are inconsistent with the federal statutory and regulatory SIP permitting requirements for PM_{2.5}.

III. Proposed Action

We are proposing to disapprove severable portions of the February 6, 2012, Oklahoma SIP submittal establishing the voluntary PM_{2.5} SILs provision and SMC. The EPA has made the preliminary determination that these submitted revisions to the Oklahoma SIP are disapprovable

² The EPA proposed approval of OAC 252:100-8-35.1(b)(3) on June 30, 2016, as consistent with federal PSD requirements. *See* 81 FR 42587.

because they establish permitting SIP requirements that are inconsistent with the federal statutory and regulatory permitting requirements for PM_{2.5}. Therefore, under section 110 and part C of the CAA, and for the reasons presented above, the EPA is proposing to disapprove the following revisions:

- Substantive revisions to the Oklahoma SIP at OAC 252:100-8-33(c)(1)(C) establishing the PM_{2.5} SMC as submitted on February 6, 2012; and
- Substantive revisions to the Oklahoma PSD program in OAC 252:100-8-35(a)(2) establishing the PM_{2.5} PSD SILs provision as submitted on February 6, 2012.

The EPA is proposing to disapprove the revisions listed because the submitted provisions are inconsistent with the federal statutory and regulatory permitting requirements for PM_{2.5}. Upon finalization of this disapproval owners or operators of a proposed source or modification will continue to satisfy the source impact analysis provisions for PM_{2.5} as required under the Oklahoma SIP at OAC 252:100-8-35(a)(1). Additionally, the State of Oklahoma would continue to have the necessary authority to require monitoring of PM_{2.5} under the Oklahoma SIP at OAC 252:100-8-35.1(b)(3) consistent with the provisions of 40 CFR 52.21(m). Finalization of this proposed disapproval will not require the EPA to promulgate a Federal Implementation Plan, because the Oklahoma PSD program will continue to satisfy the Federal PSD SIP requirements for PM_{2.5} monitoring and source impact analysis. We are proposing this disapproval under section 110 and part C of the Act; as such, the EPA will not impose sanctions as a result of a final disapproval.

IV. Statutory and Executive Order Reviews

- A. *Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. There is no burden imposed under the PRA because this action proposes to disapprove submitted revisions that are no longer consistent with federal laws and regulations for the regulation and permitting of PM_{2.5}.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action proposes to disapprove submitted revisions that are no longer consistent with federal laws and regulations for the regulation and permitting of PM_{2.5}, and therefore will have no impact on small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector. This action proposes to disapprove submitted revisions that are no longer consistent with federal laws and regulations for the regulation and permitting of PM_{2.5}, and therefore will have no impact on small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action proposes to disapprove provisions of state law that are no longer consistent with federal law for the regulation and permitting of PM_{2.5}; there are no requirements or responsibilities added or removed from Indian Tribal Governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it disapproves state permitting provisions that are inconsistent with federal laws and regulations for the regulation and permitting of PM_{2.5}.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. This action is not subject to Executive Order 12898 because it disapproves state permitting provisions that are inconsistent with federal laws and regulations for the regulation and permitting of PM_{2.5}.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 29, 2016.

Ron Curry,
Regional Administrator, Region 6.